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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Supreme Court No. R-16-0031

**PETITION TO DELETE RULE 20,
TO ADD RULE 24.1 AND TO
RENUMBER RULES 24.1, 24.2,
24.3, AND 24.4, ARIZONA RULES
OF CRIMINAL PROCEDURE**

**DRAFT COMMENT BY
THE ARIZONA PROSECUTING
ATTORNEYS' ADVISORY
COUNCIL**

I. BACKGROUND OF PETITION

The Maricopa County Attorney has asked the Arizona Supreme Court to delete Rule 20, *Arizona Rules of Criminal Procedure*, which allows a court on its own motion or motion of a defendant to enter a judgment of acquittal if there is "no substantial evidence to warrant a conviction." The request in the petition would also move the post-verdict portions of Rule 20 to a new Rule 24.1 and renumber that existing rule's subsections. The effect of the petition would maintain a defendant's procedural right to have a judgment of acquittal entered, but would also allow appellate review of any judgment of acquittal, thereby assuring a crime victim's right to justice and due process along with the State's

1 right to a jury trial.

2 **II. DISCUSSION/ANALYSIS**

3 After considering the petition and its grounds, the Arizona Prosecuting
4 Attorneys' Advisory Council urges the Arizona Supreme Court to support
5 Petition R-16-0031. As the petition points out, the case law in this area is replete
6 with examples of an acquittal being granted at the trial court level that is later
7 found to be in error. Nonetheless, the law is clear that once a judgment of
8 acquittal is made before verdict, there is no right to appeal that decision, even if
9 wrong, because double jeopardy precludes a retrial following that acquittal.
10 Neither crime victims nor the interest of justice are served by this procedure.
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12 The seminal case on this issue is *Evans v. Michigan*, 133 S.Ct. 1069, 185
13 L.Ed.2d 124 (2013). In that arson case, after the State of Michigan had rested, the
14 trial court entered a judgment of acquittal based on its belief that the State had not
15 presented sufficient evidence of all the elements of the crime. Unfortunately, the
16 trial court was wrong about the elements of the crime, and its acquittal was
17 erroneous. The Supreme Court had to decide whether that erroneous acquittal
18 prevented a retrial based on double jeopardy principles, and it found that it did.
19 The Court recognized its long-held position that double jeopardy bars a retrial
20 following a court-ordered acquittal, even if that acquittal is "based upon an
21 egregiously erroneous foundation." *Evans*, 133 S.Ct. at 1074, quoting *Fong Foo*
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1 *v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). The
2 same is also true when a court bases its acquittal upon an erroneous decision on a
3 motion to exclude evidence. *Sanabria v. United States*, 437 U.S. 54, 68-69, 98
4 S.Ct. 2170, 576 L.Ed.2d 43 (1978). See also discussion in *Smith v.*
5 *Massachusetts*, 543 U.S. 462, 467-468, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005).

7 The *Evans* court also recognized that states are “hardly powerless to
8 prevent this sort of situation”, noting that nothing obligates them to afford their
9 trial courts the ability to grant a midtrial acquittal. *Evans*, 133 S.Ct. at 1081.
10 Citing *United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232
11 (1975), the Court indicated that to avoid double jeopardy concerns, other states
12 and the federal system “allow or encourage” their courts to defer ruling on a
13 motion to acquit until after the jury returns a verdict. *Id.* In this way, reversal
14 would result in a reinstatement of the jury verdict. *Wilson*, 420 U.S. at 352-53. It
15 is with this background that petitioner asks the Court to eliminate Arizona’s Rule
16 20, thereby removing the trial court’s ability to enter a judgment of acquittal
17 before jury verdict and its attendant double jeopardy concerns. The ability to
18 enter a judgment of acquittal after verdict would be maintained.

22 There is no constitutional or statutory right to a midtrial acquittal. In fact,
23 some states do not allow court-decreed acquittals. For instance, in *State v.*
24 *Davenport*, 147 So.3d 137 (La. 2014), the Louisiana Supreme Court explained
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1 that “Louisiana law and jurisprudence has unmistakably rejected empowering
2 judges to take cases away from criminal juries and interjecting their own
3 determination of evidence sufficiency before a verdict is rendered.” *Davenport*,
4 147 So.3d at 146. Relying on its state constitution, the Court ruled that questions
5 of guilt or innocence can only be decided by a jury. *Id.*

7 Another example is *State v. Combs*, 14 P.3d 520 (Nev. 2000), the Nevada
8 Supreme Court noted that it was error for the trial court to grant a defendant’s
9 motion to dismiss at the close of the State’s case-in-chief. *Combs*, 14 P.3d at 521.
10 Nevada statutes provided that either the court give non-binding advise to the jury
11 to acquit (N.R.S. 175.381(1)) or enter a judgment of acquittal after the jury
12 returns a verdict of guilty (N.R.S. 175.381(2)). Many other states (e.g. Alaska,
13 Delaware, Iowa, New York, and West Virginia) provide that a trial court may
14 *reserve* its decision on a defendant’s challenge to the sufficiency of the evidence
15 until after the jury returns a verdict of guilty. See *Smith v. Massachusetts*, supra,
16 543 U.S. at 478, n.2 (Ginsburg, J., dissenting). Arizona’s current Rule 20,
17 however, specifically disallows a court from reserving its decision.

21 The right to a trial by jury in Arizona is “inviolable”, and in all criminal
22 cases the unanimous consent of jurors is necessary to render a verdict. Ariz.
23 Const. art. 2, § 23. Crime victims in Arizona also have the right “to justice and
24 due process.” Ariz. Const. art. 2, § 2.1. Victims have the specific right to a
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1 “speedy” trial and to have all rules of criminal procedure protect their victims’
2 rights, with those rules amended or repealed when necessary to protect those
3 rights. Ariz. Const. art. 2, §§ 2.1(10), (11). The intent of R-16-0031 is to
4 preserve a court’s ability to order an acquittal based on insufficiency of evidence,
5 either *sua sponte* or on motion, while at the same time protecting a victim’s right
6 to justice and due process and providing an opportunity to have the court’s
7 decision reviewed. Petitioner has cited numerous cases in which a pre-verdict
8 acquittal has resulted in a finding of error and reversal under different scenarios.
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11 There is no drawback to supporting this petition. A criminal defendant still
12 has the benefit of an acquittal if the trial court believes there is no substantial
13 evidence to warrant a conviction; that benefit merely comes after a guilty verdict.
14 And there is no valid argument for maintaining a defendant’s windfall from a pre-
15 verdict acquittal when the only advantage is preventing legal review of that
16 acquittal.
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18 **III. CONCLUSION**

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20 The Arizona Prosecuting Attorneys’ Advisory Council respectfully
21 requests that the Arizona Supreme Court adopt the request to delete Rule 20 as
22 requested in petition R-16-0031. The proposal will preserve a criminal
23 defendant’s ability to have a court enter judgment of acquittal if it finds there is
24 insufficient evidence to warrant a conviction, while still protecting a victim’s
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1 right to justice and due process and allowing for review of that judgment. The
2 interest of justice is more fully served by adopting this petition.

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4 RESPECTFULLY SUBMITTED this ____day of_____, 2016.

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7 _____
8 Elizabeth Ortiz, #012838
9 Executive Director
Arizona Prosecuting Attorneys'
Advisory Council

10 Electronic copy filed with the
11 Clerk of the Arizona Supreme Court
12 this ____ day of _____, 2016.

13 by: _____
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